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Notes

Pursuing Native American Rights in International Law Venues: A *Jus Cogens* Strategy After *Lyng v. Northwest Indian Cemetery Protective Association*

by
CHRISTOPHER P CLINE*

Through tatter'd clothes small vices do appear;
Robes and furr'd gowns hide all. Plate sin with gold,
And the strong lance of justice hurtless breaks;
Arm it in rags, a pigmy's straw does pierce it.[1]

In a recent bestselling book, the late Joseph Campbell noted the emergence of the "Gaia Principle," named for the goddess of the Earth, under which scientists are beginning to view "the whole planet as an organism."[2] Campbell saw in this principle the dawning of a new "world myth," grounded in "the eye of reason, not of my nationality; . not of my religious community; not of my linguistic community "[3] Unfortunately, Campbell did not live to see his mythological hypothesis become a social and political reality The rending of the Iron Curtain, the unification of Europe, and the growing international economic interdependence indicate that the peoples of the earth are becoming a world community [4] Even in the United States, a country often criticized for its egocentrism,[5] the talk is of trade deficits with Japan, the destruction of the Equatorial Rain Forests, holes in the Antarctic ozone.[6]

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1. W SHAKESPEARE, *King Lear*, IV.vi. 162-65.
2. J. CAMPBELL WITH B. MOYERS, THE POWER OF MYTH 32 (1988).
3. *Id.*
4. *See, e.g.*, Carter, *A Fragile World Can Survive by Refurbishing Postwar Solutions*, Wall St. J., Mar. 30, 1989, at A15, col. 3 (observing the creation of "an international economic community whose interdependence is far more total now than it was at the time of the Great Depression").
5. *See, e.g., infra* note 309 and accompanying text.
6. *See* Sebenius, *Of Red Ink and the Greenhouse*, Christian Sci. Monitor, Sept. 12, 1990,

Global unity, however, requires global law. In no context is this more apparent than in human rights. Graphic televised images of Tienanmen Square and Iraq, for example, show how far this new world community has yet to go to ensure that each of its members receives equal justice. Although the United Nations and the Organization of American States (OAS)[7] have created an impressive body of international human rights law, many nations have refused either to recognize or obey such law.[8] "[V]iolations of the most fundamental rights continue[] to cast a shadow, in all regions, on the conscience of humanity."[9]

These human rights violations are neither limited to wholesale massacres nor committed only by less-developed nations. This Note will argue, for instance, that the United States Supreme Court decision in *Lyng v. Northwest Indian Cemetery Protective Association*[10] vio-

at 19, col. 1 (addressing the huge international cost to reducing the "Greenhouse" effect, and citing as contributory problems the burning of rain forests and the surprise "discovery of the 'Ozone Hole'"); Sneider, *Anti-Tokyo Feelings Bewilder Japan: America's New Scapegoat,* Christian Sci. Monitor, Mar. 22, 1989, at 1, col. 1 (noting the growing feelings among Americans that Japan is becoming a "greater threat than the Soviet Union," in part due to perceived unfair business practices); *see also* Carter, *supra* note 4, at col. 5 ("The U.S. could not, even if it diverted all of its considerable resources, clean up its own air, water and land by itself. What is done in other lands and hemispheres affects our environment in countless ways.").

7. The Organization of American States (OAS) is an international organization created by the states of this hemisphere to achieve an order of peace and justice, to promote their solidarity, to defend their sovereignty, their territorial integrity and their independence. Within the United Nations, the Organization of American States is a regional agency.

BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/ser. L./V/II.71/doc. 6 rev. 1, at 1 (1988) [hereinafter BASIC DOCUMENTS]. The OAS seeks to arrive at "pacific settlements" of disputes among member states and to promote their economic, social, and cultural development through "cooperative action." *Id.* In the area of human rights violations, for instance, the OAS General Assembly publishes the Inter-American Commission on Human Rights' findings of human rights violations by a member state if that state has not rectified the violations. *See infra* notes 189-191 and accompanying text. The General Assembly gives the violator state the opportunity to correct its actions voluntarily before resorting to publication of the violations.

8. At the opening of the United Nations Commission on Human Rights' forty-sixth session, the temporary chairman of the Commission observed that despite the recent favorable developments in Eastern Europe and elsewhere, many problems, including "ethnic and minority tensions," have had "an adverse impact on human rights throughout the world." *Commission on Human Rights Forty-Sixth Session Summary Record of the 1st Meeting,* at para. 11, U.N. Doc. E/CN.4/1990/SR.1 (1990). The chairman concluded that the Commission must "make its voice heard" more often on the "numerous occasions when human rights were violated," and that "it must be less concerned about the risks of displeasing Governments that violated human rights and more concerned about the victims of those violations." *Id.* at para. 14.

9. *Id.* at para. 32 (statement of Mr. Martenson, Under-Secretary-General for Human Rights).

10. 485 U.S. 439 (1988).

lated the international human rights of Native Americans. The Court in *Lyng* upheld the United States Forest Service's authority to build a logging road through land held sacred to three Native American tribes (the Tribes),[11] even though the Court conceded that building the logging road would effectively destroy the Tribes' ability to practice their religion.[12] In his dissenting opinion, Justice Brennan declared that this ruling

> sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it.[13]

This Note argues that, whether or not *Lyng* was decided properly under the free exercise clause of the first amendment,[14] *Lyng* violates several of the Tribes' basic human rights as set forth in various international instruments. These rights are recognized under international law as *jus cogens,* or fundamental, peremptory norms, which may not be abrogated by any nation.[15] *Lyng* effectively authorizes the elimination of the practice of the Tribes' native religion, arguably the last vestige of their culture. This Note argues that the prejudicial insensitivity to Native American religions demonstrated by *Lyng* constitutes

11. The three tribes litigating the matter were the Yurok, Karok, and Tolowa, Native Californians who live in the Klamath area. For editorial convenience, this Note refers to these tribes collectively as "the Tribes." This term distinguishes the litigants from this Note's more general references to "Native Californians" and "tribes of the Klamath River."

12. *Lyng,* 485 U.S. at 451-52.

13. *Id.* at 476 (Brennan, J., dissenting).

14. Part II.B. of this Note joins the many scholars who have criticized the *Lyng* decision under the first amendment. *See, e.g., The Supreme Court: Leading Cases,* 102 HARV. L. REV. 143, 232-42 (1988); Note, *Judicial Scrutiny of Native American Free Exercise Rights:* Lyng *and the Decline of the Yoder Doctrine,* 17 B.C. ENVTL. AFF. L. REV. 169 (1989) (authored by Joshua Rievman); Casenote, *Unjustified Interference of American Indian Religious Rights:* Lyng v. Northwest Indian Cemetery Protective Association, 22 CREIGHTON L. REV. 313 (1988) (authored by Michele L. Seger); Comment, Lyng v. Northwest Indian Cemetery Protective Association: *Government Property Rights and the Free Exercise Clause,* 16 HASTINGS CONST. L.Q. 483 (1989) (authored by S. Alan Ray); Casenote, *An Indian Site-Specific Religious Claim Again Trips Over Judeo-Christian Stumbling Blocks* (Lyng v. Northwest Indian Cemetery Protective Association, 108 S. Ct. 1319 (1988)), 5 J. LAND USE & ENVTL. L. 293 (1989) (authored by Anita Pryor & Gypsy Bailey); Note, *New Directions in Sacred Land Claims:* Lyng v. Northwest Indian Cemetery Protective Association, 29 NAT. RESOURCES J. 593 (1989) (authored by Nancy Akins); Comment, *Constitutional Law-Limitations Upon Protection Offered by the Free Exercise Clause*—Lyng v. Northwest Indian Cemetery Protective Association, 108 S. Ct. 1319 (1988), 23 SUFFOLK U.L. REV. 126 (1989) (authored by Mark A. Newcity).

15. The Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 53, 1155 U.N.T.S. 331, 334 [hereinafter Vienna Convention]; *see also* Parker & Neylon, *Jus Cogens: Compelling the Law of Human Rights,* 12 HASTINGS INT'L & COMP. L. REV. 411, 414-15 (1989) (defining *jus cogens*).

a violation of the Tribes' rights to maintain their religion and culture that could be characterized as a denial of self-determination, an act of *apartheid,* and ultimately cultural genocide.

Members of the Tribes filed a petition[16] alleging these violations before the OAS' Inter-American Commission on Human Rights (Commission), whose principal function is to promote the observance and protection of human rights.[17] The Commission has the power to determine whether a governmental act such as a United States Supreme Court decision violates the human rights standards that the United States, by ratifying the OAS Charter,[18] has agreed to observe.[19] In finding a violation of international human rights law by the United States in a previous case,[20] the Commission stated that

> there is a limit on any State's ability to regulate a matter . . . if the result will violate international law. Domestic legislation of [OAS] member states cannot validate conflict with international obligations; a state cannot invoke its contrary domestic law as justification for its failure to abide by an agreement.[21]

The Commission has the power to declare that the United States violated the Tribes' rights, regardless of the Supreme Court ruling that

16. At the time of this writing, the Inter-American Commission had not yet heard this petition. The Commission hoped to make a preliminary decision on how it would proceed at its next regular meeting, scheduled for October 1990. Letter from David J. Padilla, Secretario Ejecutivo Ajunto to the Inter-American Commission on Human Rights, to Marilyn B. Miles, Directing Attorney of the California Indian Legal Services (the organization filing the petition on behalf of the Tribes) (May 29, 1990) (letter on file at the office of *The Hastings Law Journal*).

Also pending at the time of this writing is a bill, H.R. 2566, 101st Cong., 2d Sess. § 5(b)(2)(H) (1990), that would make the strip of land set aside for the G-O Road protected wilderness, foreclosing the building of that road. Passage of this bill would render any decision by the Commission moot; therefore, the Commission probably would not make a determination based upon the Tribes' petition if the bill is enacted into law. Although declaring the G-O Road area protected wilderness would enable the Tribes' to perform their site-specific religious ceremonies, it would not address the human rights violations that may be the progeny of the *Lyng* decision.

17. *Regulations of the Inter-American Commission on Human Rights,* art. 1, at para. 1 [hereinafter *IACHR Regulations*], *reprinted in* BASIC DOCUMENTS, *supra* note 7, at 75-103.

18. O.A.S. CHARTER, art. 13. The ratified Charter was deposited by the United States with the Pan American Union on June 19, 1951. 2 U.S.T. 2394, T.I.A.S. No. 2361, 9 O.A.S.T.S. 43. The United States deposited the amendments to the charter with the General Secretariat of the OAS on April 26, 1968. 21 U.S.T. 607, T.I.A.S. No. 6847, 9 O.A.S.T.S. 88.

19. *See infra* notes 189-194 and accompanying text.

20. Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987) [hereinafter *Roach Death Penalty Case*]. In this case, the Commission found that the United States government violated fundamental human rights law by executing two 17-year-olds. *Id.* para. 64-65, at 173. The Commission also reaffirmed that the United States' international obligation as a member of the OAS "is governed by the Charter of the OAS (Bogotà, 1948), as amended by the Protocol of Buenos Aires on 27 February 1967." *Id.* para. 46, at 165.

21. *Id.* at 157.

the governmental action did not violate the first amendment.[22] Recourse before the Commission is particularly appropriate for the Tribes in light of the Commission's mandate that "special protection for indigenous populations constitutes a sacred commitment of the states."[23] International attention to United States human rights violations may be the only means of securing equitable treatment for the Tribes and Native Americans in general, given the attitude of indifference and hostility that Native Americans have encountered in this country.[24]

A finding by the Commission that *Lyng* violates the Tribes' international human rights would be particularly important for the emerging world community. The potential for international organizations to become viable venues for international dispute resolution has never been greater.[25] Focused attention on violations of human rights by the United States and pressure to rectify the damage inflicted by these violations are necessary to establish an effective enforcement mechanism for human rights worldwide. The United States insists that other nations comply with human rights standards and[26] it has invoked these standards in international forums in actions against other nations.[27] The United States, however, has ratified very few of the major human rights treaties now in existence.[28] Furthermore, the United

22. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988).

23. *Report on the Work Accomplished by the Inter-American Commission on Human Rights During its Twenty-Ninth Session,* at 64, OEA/ser. L./V./II.29, doc. 40 rev. 1, (1972).

24. See *infra* notes 67-81 and accompanying text for a discussion of the treatment of Native Californians, and *infra* notes 163-173 and accompanying text for a discussion of the treatment of Native Americans generally.

25. *See, e.g.,* Greenberger, *U.N., Long Stymied by Cold War, Begins To Fulfill Its Promise,* Wall St. J., Aug. 30, 1990, at 1, col. 1 (observing that the United Nations "seems poised to realize its potential, coming of age as a formidable instrument for resolving international conflicts before they erupt into war").

26. In one month, for instance, the State Department of the United States called upon the governments of Cuba, North Korea (Schifter, *Human Rights Situation in Cuba,* DEP'T ST. BULL., Oct. 1989, at 41-43), and Bulgaria (*Ethnic Turks in Bulgaria, Id.* at 43), to comply with international human rights standards.

27. *See* United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran) 1980 I.C.J. 3 (Final Order). In this suit against Iran, the United States claimed that the failure to provide protection for United States nationals during the hostage taking at the Embassy was a violation of fundamental rights:

> The existence of such fundamental rights for all human beings gives rise to a corresponding duty on the part of every State to respect and observe them as reflected in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, regional conventions and other instruments defining basic human rights . . . .

Comment, *The Former American Hostages' Human Rights Claims Against Iran: Can They Be Waived?,* 4 HOUS. J. INT'L L. 101, 112 (1981).

28. The United States has ratified only *one* of the many major human rights instruments referred to in this Note: the Convention on the Crime and Punishment of the Crime of

States Supreme Court recently ignored a *jus cogens* determination by the Commission in holding that international standards of decency are not dispositive.[29] The Commission's disapproval of *Lyng* would underscore a crucial principle of international law: despite domestic approval of governmental actions, laws of *jus cogens* create a legal floor, representing a minimum standard of human rights below which no nation may drop.

This Note argues that the *Lyng* decision and the governmental actions that preceded it constitute a human rights violation by the United States and discusses the means of recourse available after such a violation has occurred. Further, this Note hopes to demonstrate that regardless of the restrictive view of constitutional rights that the current Supreme Court supports, the United States government may not deprive any citizen or group of citizens of certain fundamental rights. Part I will begin by presenting a brief overview of the history and scope of international human rights law. It then will present the factual background of the *Lyng* decision, describing the religion of the Tribes, the historical relationship of Native Californians with the encroaching settlers, and the current status of the Tribes. Part II will analyze the grounds for the *Lyng* decision, discussing the lower court rulings and the Supreme Court's interpretation of its own first amendment decisions. This historical and legal discussion will serve as the factual basis for Part IV's argument that *Lyng* engendered international hu-

Genocide. *See infra* note 280. The Genocide Convention, although adopted by the United Nations General Assembly in 1948 in response to the horrors of the Holocaust, was not ratified by the United States until February 1989. *Id.* Moreover, the United States refused to ratify it completely, preferring instead to include modifications and understandings. *Id. See also* Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis,* 41 HASTINGS L.J. 805, 810-11 (1990) ("Of the more than forty human rights agreements to which the U.S. could be a party, however, it has ratified only twelve.").

29. In the *Roach Death Penalty Case, supra* note 20, the Inter-American Commission found that the execution of minors, upheld by the Supreme Court, was a violation of fundamental human rights law. Two years later the Supreme Court in Stanford v. Kentucky, 109 S. Ct. 2969 (1989), held that a state imposition of the death penalty on minors (in this case, a 16- and a 17-year-old) was not cruel or unusual punishment under the eighth amendment. *Id.* at 2980. The majority emphasized "that it is *American* conceptions of decency that are dispositive" in determining what is cruel or unusual punishment, and refused to consider the sentencing practices of other nations. *Id.* at 2975 n.1. The dissent would have looked to the world community's overwhelming disapproval, among other sources, in finding that the execution of minors is cruel and unusual. *Id.* at 2985-86 (Brennan, J., dissenting). Specifically, the dissent cited three major human rights instruments supporting that position. *Id.* at 2985 n.10. The dissent also pointed out that the United States was responsible for three of the eight executions of minors carried out worldwide during the previous ten years. *Id.* at 2985. Neither the majority nor the dissent, however, recognized the condemnation in the *Roach Death Penalty Case* of the United States' execution of minors.

man rights violations. This discussion also will demonstrate how the *Lyng* decision misinterprets both the Court's own prior first amendment rulings and Congress' intent with regard to Native American religious rights.

Part III will discuss briefly the procedures used to allege human rights violations before the various international tribunals and will show that, generally, the Commission is the most appropriate forum for United States citizens and groups seeking to make such allegations. Part IV will examine the violations of fundamental human rights law of the Inter-American system and fundamental international laws against the prevention of self-determination, *apartheid,* and genocide. By describing these violations, the Tribes' potential recourse before the OAS, and the procedures necessary to obtain such recourse, this Note hopes to inspire those who may find themselves faced with similar violations by the United States government to pursue their rights fully.

Finally, Part V will describe potential means of implementing international human rights law into domestic jurisprudence and will explain why the United States must adhere to international human rights standards in its dealings with the Tribes and with all its citizens.

I. Legal and Historical Background

An understanding of the violations engendered by the *Lyng* decision requires an understanding of both the law that the decision violated and the Tribes' culture and religion that the decision disrupted. An appropriate starting point for this Note, therefore, is a discussion of the nature of international human rights law and of the Tribes' religion, culture, and history.

A. The Nature of International Human Rights Law

The foundations of international human rights law extend to the natural law philosophy of Plato, Sophocles, and Cicero.[30] That human rights are appropriate for international regulation, however, is a new concept, and "most of what we now regard as 'international human rights law' has emerged only since 1945," following the Holocaust.[31] In part a response to the Nazi atrocities, the United Nations Charter "established general obligations" requiring its member states to re-

30. Parker & Neylon, *supra* note 15, at 419-21.

31. Bilder, *An Overview of International Human Rights Law,* in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 5 (H. Hannum ed. 1984).

spect and promote human rights and fundamental freedoms.[32] Since the initial establishment of these rights, the United Nations and the OAS have dramatically expanded their involvement[33] in human rights, both regionally and worldwide. Both have adopted numerous human rights instruments and have created human rights commissions.[34]

The substance of international human rights law is derived from two types of sources:[35] what might be called "treaty law," which includes the charters, treaties, and declarations adopted by the United Nations, the OAS, and other international organizations that address human rights;[36] and customary international law, which is evidenced by "widespread state practice."[37] *Jus cogens* is a superior subgroup of customary international law. The term *jus cogens* is somewhat elusive.[38] One international convention uses the term "peremptory norm,"[39] a term that reinforces its compelling, fundamental nature.[40] *Jus cogens* also has been defined as "rules which derive[] from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international community."[41] Although this definition focuses more upon the international effect of *jus cogens* rules, they also have an individual effect; the Universal Declaration of Human Rights,[42] for instance, speaks of "inherent dignity" and "equal and inalienable rights,"[43] while the American Convention refers to "essential rights."[44] A good working definition of a *jus cogens* law

32. *Id.*

33. This involvement by the United Nations and the OAS is both collective and separate. For instance, although the OAS is a regional agency of the United Nations, *see* supra note 7, and makes determinations based upon regional standards, *see infra* notes 198-200 and accompanying text (determination that execution of minors is a *jus cogens* violation in this hemisphere, *see, e.g., Roach Death Penalty Case, supra* note 20), it also contributes to the body of international instruments and writings that together establish *jus cogens* standards worldwide. *See infra* notes 226, 284-287 and accompanying text.

34. Bilder, *supra* note 31, at 5.

35. *See, e.g.*, R. LILLICH, INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS 1 (1985) (describing the two sources of enforceable international human rights law in United States domestic courts as treaties and customary international law).

36. Bilder, *supra* note 31, at 7.

37. *Roach Death Penalty Case, supra* note 20, at para. 52.

38. Parker & Neylon, *supra* note 15, at 414-16.

39. Vienna Convention, *supra* note 15, art. 53, at 344.

40. Parker & Neylon, *supra* note 15, at 416-27.

41. *United Nations Conference on the Law of Treaties, Official Records,* at 294, U.N. Doc. A/CONF.39/11, U.N. Sales No. E.68.V.7 (1969) (statement of Mr. Suarez, Mexican delegate to the United Nations Conference on the Law of Treaties).

42. G.A. Res. 217(III)A, 3(1) U.N. GAOR at 71, U.N. Doc. A/810 (1948).

43. *Id.* preamble, para. 1, at 71.

44. American Convention, Nov. 22, 1969, 9 I.L.M. 673, *reprinted in* BASIC DOCUMENTS, *supra* note 7, preamble, at 25.

may be that it is "a peremptory norm of international law from which no derogation is permitted."[45]

The distinction between the treaty law and customary law is somewhat artificial; for example, a customary international norm often derives from a standard common to the various international human rights instruments and treaties.[46] The distinction is useful, however, in determining how to allege a human rights violation by a nation. To allege a treaty violation, a party must show that the suspect nation ratified the treaty in question and intended for the treaty to be binding law.[47] A customary international law violation may be alleged only against a nation that has not protested that norm.[48] A customary international law that has achieved the status of *jus cogens,* however, is binding on all states, whether or not they have protested that law.[49]

International human rights may be enforced at various levels, depending upon the policy of the alleged violator nation regarding these rights. Incorporating international human rights standards directly into domestic law allows for enforcement by the most effective mechanism: the domestic legal system.[50] If the aggrieved party has not obtained redress after exhausting domestic remedies, however, it may seek enforcement either at the interstate level (at which another nation pressures the violating nation to cure the violation) or at the level of international organizations such as the United Nations, the OAS, or the Council of Europe.[51]

The Tribes initially sought domestic redress for the violations of their basic human rights. After being denied such redress by the Supreme court in *Lyng,* the tribes have taken their grievances to the Commission. In order to understand fully the impact of the federal government's actions on the Tribes, the inadequacy of the Supreme Court's ruling, and the necessity for obtaining international redress, a brief discussion of the Tribes' historical and cultural background is helpful.

45. *Id.* para. 54.

46. *See, e.g., infra* notes 217-224, 260-265, 280-285 and accompanying text (defining the prohibitions against *apartheid* and genocide, in part by referencing various international human rights instruments).

47. *See, e.g.,* R. LILLICH, *supra* note 35, at 2 (stating that the enforceability of the United Nations Charter human rights provisions in the United States turns on whether the Charter is "self-executing").

48. *Roach Death Penalty Case, supra* note 20, at para. 54.

49. *Id.*

50. Bilder, *supra* note 31, at 13.

51. *Id.* at 13-14.

B. Historical and Cultural Background of the Tribes

The purpose of the Tribes' primary religious ceremonies, generally called "World Renewal,"[52] is to renew or maintain the established world and to protect mankind from disease.[53] The "World Renewal" process begins with Tribal healers and leaders acquiring spiritual power or "medicine" through "silent, solitary meditation in the high country" of the Siskiyou Mountains.[54] This silent meditation at specific locations is crucial for the "religious efficacy" of the ceremonies.[55] The Tribes also perform sacred dances[56] in the "high country," the site of most of their religious ceremonies.[57] Because the Tribes believe that creative spirits live within these mountains, their religion is site-specific.[58] The localization of the ceremonies is extreme: the Tribes believe, for instance, that the sacred house in which they perform each religious ceremony has stood "since the time when there were no men in the world."[59] This type of site-specific religion stands in contrast to the many other religions that allow worship to take place in any building of the same denomination throughout the world.[60]

The Tribes' connection with the Siskiyou Mountains extends beyond their religious practices to include their culture.[61] For example, the most desirable acorns and basket materials come from progressively higher altitudes, houses placed higher on a hill indicate higher social rank, and increases in height above the Klamath River correspond to increases in both personal and medicinal power.[62] Indeed,

52. D. Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest 45 (Apr. 9, 1979) [hereinafter Theodoratus Report] (available as Appendix K to the Exhibits, Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986) (Civ. A. No. 83-2225), *rev'd,* 485 U.S. 439 (1988)). This report, commissioned by the Forest Service, was compiled to determine the impact of the G-O road upon the Tribes.

53. *Id.*; A.L. KROEBER, HANDBOOK OF THE INDIANS OF CALIFORNIA 53 (1967).

54. Comment, Lyng v. Northwest Indian Cemetery Protective Association: *Government Property Rights and the Free Exercise Clause, supra* note 14, at 485.

55. *Id.* at 485-86.

56. Theodoratus Report, *supra* note 52, at 45.

57. Comment, Lyng v. Northwest Indian Cemetery Protective Association: *Government Property Rights and the Free Exercise Clause, supra* note 14, at 483, 485-86.

58. *Id.*

59. A.L. KROEBER, *supra* note 53, at 54.

60. Justice Brennan described this distinction well: "Where dogma lies at the heart of western religions, Native American faith is inextricably bound to the use of the land." Lyng v. Northwest Indian Protective Cemetery Ass'n, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting).

61. Theodoratus Report, *supra* note 52, at 71.

62. For convenience, this Note often will refer to "culture" and "religion" collectively as "religion." As this Note will show, international law protects both religion and culture, making the distinction irrelevent.

the Tribes have developed complex interrelationships between the land, their culture, and their religion. For instance, the Tribes use sacred power derived from the high country for medicinal purposes,[63] and believe that sacred dances are necessary for bountiful fishing.[64] Their religious "origin stories are interwoven with events from daily life to explain how things came about,"[65] and their dances provide an opportunity for the wealthy members of the Tribe to display their property.[66] The Tribes' identity as peoples is bound up with the country in which they live.

The white settlers of California, however, refused to recognize the Tribes'.identification with the land. In fact, the treatment of the Tribes and of other Native Californians by settlers and the state and federal governments is hallmarked by its brutality. The encroachment of settlers into California diminished the food supplies of many California tribes.[67] When Native Californians throughout the state resorted to petty theft out of hunger, the settlers began waging an "indiscriminate war" on them.[68] Tribes in the Klamath River area, deprived of their usual food sources by the encroachment and driven to the point of starvation, resorted to killing white men and plundering for their food.[69] This resulted in an organized campaign by the settlers to kill the members of those tribes.[70] Military expeditions set out on "exciting Indian hunt[s]."[71]

The federal government recognized these atrocities and attempted, at least initially, to remedy them. In 1851, Redick McKee, one of three California Indian agents appointed by President Fillmore, drafted five treaties between the United States and northern California tribes, in-

63. Theodoratus Report, *supra* note 52, at 70.

64. *Id.* at 49.

65. *Id.* at 45-46.

66. A.L. KROEBER, *supra* note 53, at 54.

67. Letter from George Wooman and D.C. Johnson to Thomas J. Henley, Superintendent of Indian Affairs in California (Mar. 25, 1855), *reprinted in* R. HEIZER, THE DESTRUCTION OF CALIFORNIA INDIANS 27-29 (1974). Further, many Native Californians were ravaged by venereal disease introduced by the encroaching settlers. Letter from E.A. Stevenson, Special Indian Agent, to Thomas J. Henley, Superintendent of Indian Affairs in California (Dec. 31, 1853), *reprinted in* R. HEIZER, *supra,* at 13-16. Other Native Californians were sold into slavery by the settlers. Letter from William McDaniel and William McQueen to Thomas J. Henley, Superintendent of Indian Affairs in California (Oct. 4, 1854), *reprinted in* R. HEIZER, *supra,* at 19-21.

68. Letter from Thomas J. Henley, Superintendent of Indian Affairs, California, to Charles E. Mix (June 19, 1858), *reprinted in* R. HEIZER, *supra* note 67, at 34-35.

69. Newspaper Editorial, Sacramento (1855), *reprinted in* R. HEIZER, *supra* note 67, at 35-36.

70. *Id.*

71. Newspaper article, San Francisco (1864), *reprinted in* R. HEIZER, *supra* note 67, at 97-99.

cluding the Treaty of the Klamath on October Sixth.[72] A sample of one of these treaties made by McKee with the native California tribes indicates that the tribes were to relinquish title to their lands and place themselves under United States jurisdiction.[73] In exchange, the United States government was to set aside certain lands for the tribes' permanent use and occupancy and to provide the tribes with supplies, horses, education, and training.[74] Mounting debt, fraud by Indian agents, and growing sentiment against treaties, however, led the Joint Senate and Assembly Committee on Indian Affairs to recommend opposition to all California Indian treaties.[75] The United States Senate rejected the treaties on the ground that the United States acquired California from Mexico, which "regarded itself as the absolute and unqualified owner of it," and thus the Native Californians "had no usufructuary or other rights therein."[76] Once rejected, these treaties were placed in the Senate's secret files for more than fifty years.[77] Although the federal government recognized the sovereignty of the tribes in the Klamath River area by instituting treaty negotiations, in the end it retracted that recognition, apparently for reasons of expedience and public opinion.

The present status of Native Californians remains much the same. More than one-third of the Native Californian tribes still are unrecognized by the federal government.[78] The Tribes are in particularly dire straits. At a recent Senate hearing regarding the fate of certain Yurok lands, Congressman Doug Bosco referred to the Yurok as "some of the poorest people in our country, suffering unemployment rates up to 60 percent,"[79] and as "the poorest people in our State,"[80] who have yet to receive "funds due them from the government."[81]

Poverty has not destroyed the Tribes' spirit. Although in poor economic shape, they have kept their cultural heritage alive through the practice of their religion.[82] The *Lyng* decision, however, would

72. *See* C. HOOPES, DOMESTICATE OR EXTERMINATE: CALIFORNIA INDIAN TREATIES UNRATIFIED AND MADE SECRET IN 1852 at 60 (1975).

73. *Id.* at 122-24.

74. *Id.*

75. *Id.* at 82-96.

76. *Id.* at 106-07 (quoting William R. King, Senate Chairman of the Executive Committee).

77. *Id.* at 107.

78. *California Indians Waging New Fight for Their Rights,* San Francisco Chron., Jul. 9, 1990, at A1, col. 1, A6, col. 5 (discussing the Native Californians' pursuit of federal recognition through legislation).

79. *Hoopa-Yurok Indian Reservation, Hearing on S. 2723 Before the Senate Select Comm. on Indian Affairs,* 100th Cong., 2d Sess. 29 (1988) [hereinafter *Yurok Reservation Hearing*].

80. *Id.* at 31.

81. *Id.* at 30.

82. Theodoratus Report, *supra* note 52, at 69-71.

permit the federal government effectively to strip away this last vestige of their culture.

II. *Lyng v. Northwest Indian Cemetery Protective Association*

In 1982, the United States Forest Service approved a plan to pave six miles of dirt road for use by logging trucks between the towns of Gasquet and Orleans (G-O Road) traversing the Chimney Rock area of California's Siskiyou Mountains, an area sacred to the Tribes.[83] The Forest Service decided to pave despite the recommendation of a preliminary study, which the Service itself commissioned, that the road not be built because it would "produce an irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok and Tolowa communities"[84] by destroying the solitude necessary for their religious ceremonies.[85]

Members of the Tribes, environmental groups, and the State of California sought a permanent injunction against the building of the G-O Road and against the timber harvesting the Forest Service had authorized.[86] The members of the Tribes asserted that The Forest Service's building the road through the Tribes' sacred grounds would violate their first amendment rights under the free exercise clause.[87] The district court agreed and held that the government's interests in building the road for logging purposes fell "far short" of those required to justify the infringement on the Tribes' constitutional rights.[88]

The Court of Appeals for the Ninth Circuit upheld this part of the district court's decision.[89] While the appeal was pending, the Forest Service's compelling interest argument was substantially weakened: Congress enacted the California Wilderness Act of 1984,[90] which placed all of the high country, except the strip of land needed to build the

83. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988).

84. Theodoratus Report, *supra* note 52, at 422.

85. *See Lyng*, 485 U.S. at 442.

86. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983).

87. *Id.* at 590.

88. *Id.* at 596.

89. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 692-95 (9th Cir. 1986). The court of appeals affirmed the district court's injunction of the building of the G-O Road. It vacated, however, the portion of the district court's order that enjoined the defendant from harvesting timber until an environmental impact statement could be prepared and evaluated. *Id.* at 698.

90. Pub. L. No. 98-425, 98 Stat. 1619 (1984).

G-O Road, in wilderness and "out of the reach of logging."[91] Based upon this congressional act and the lower court findings, the appellate court affirmed the permanent injunction of the building of the G-O Road.[92]

A. The Supreme Court's Ruling

The Supreme Court also considered the conclusions of the Theodoratus Report[93] and was willing to assume that building the G-O road would "virtually destroy the . . . Indians' ability to practice their religion."[94] The Court reversed the lower court decisions, however, holding that "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[95]

In reaching this conclusion, the majority relied upon *Bowen v. Roy*.[96] In *Roy*, the Court stated that the free exercise clause does not require the government to conduct its "internal affairs"[97] in accordance with the religious beliefs of its citizens. The free exercise clause protects individuals from governmental compulsion but does not allow them to dictate governmental conduct.[98] The *Roy* respondents challenged the Aid to Families with Dependent Children requirement that prospective welfare recipients furnish state welfare agencies with Social Security numbers for all household members as a condition of receiving benefits.[99] The respondents contended that their daughter would be robbed of her spirit if she obtained a Social Security number and that the requirement therefore violated their first amendment rights.[100] Reasoning that the free exercise clause does not confer "a right to dictate the conduct of the Government's internal procedures,"[101] the Court held that the respondents could "no more prevail on [their] religious objection to the Government's use of a Social Security num-

91. *Peterson*, 795 F.2d at 691. The Supreme Court in *Lyng* also noted that construction of the G-O Road was optional under the California Wilderness Act, the exemption for construction being granted only "if the responsible authorities so decide." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 444 (1988) (quoting S. REP. No. 582, 98th Cong., 2d Sess. 29 (1984)).

92. *Peterson*, 795 F.2d at 698.

93. *Lyng*, 485 U.S. at 442.

94. *Id.* at 451-52.

95. *Id.* at 452.

96. 476 U.S. 693 (1986).

97. *Id.* at 699.

98. *Lyng*, 485 U.S. at 448 (interpreting *Roy*).

99. *Roy*, 476 U.S. at 695.

100. *Id.* at 695-96.

101. *Id.* at 700.

ber . . . than [they] could on a sincere religious objection to the size or color of the Government's filing cabinets."[102]

The *Lyng* majority held that the Forest Service's building of the G-O Road could not be factually distinguished from the government's use of a social security number in *Roy*.[103] The majority stated that the "incidental effects"[104] of a government program that do not coerce individuals to act contrary to their religious beliefs may not compel the government to justify its otherwise lawful actions.[105] Although building the G-O Road would totally disrupt the Tribes' site-specific religious practices, the first amendment, according to the majority, does not require the government "to satisfy every citizen's religious needs and desires."[106] The Court feared that a favorable ruling for the Tribes effectively would allow anyone with a first amendment claim to shut down governmental operations.[107]

The majority rejected the argument that building the G-O Road would violate the Tribes' rights under the American Indian Religious Freedom Act (AIRFA),[108] which the Tribes claimed supports their interpretation of the first amendment.[109] The majority held that the Forest Service complied with AIRFA by choosing the least intrusive route for the road, and ruled that AIRFA did not create a cause of action for the Tribes.[110]

The discussion that follows not only will lay the groundwork for a consideration of *Lyng*'s potential *jus cogens* violations, which occur regardless of the correctness of the decision from a constitutional standpoint, but also will criticize the *Lyng* Court's first amendment analysis.

B. The Constitutional Infirmity of *Lyng*

The majority's coercion standard[111] for free exercise protection can be seen as a departure from previous first amendment analysis. An historical examination of the first amendment reveals that underlying the free exercise clause is a principle of religious "volunta-

102. *Id.*
103. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).
104. *Id.* at 450.
105. *Id.* at 450-51.
106. *Id.* at 452.
107. *Id.* at 452-53.
108. 42 U.S.C. § 1996 (1988) (codifying the policy to protect and preserve Native Americans' freedom to believe and express their traditional religions).
109. *Lyng*, 485 U.S. at 455.
110. *Id.* at 454-55.
111. *See supra* notes 104-106 and accompanying text.

rism,"[112] which guarantees "freedom of conscience by preventing any degree of compulsion in matters of belief."[113] Voluntarism suggests that the free exercise clause was intended to prohibit "not only direct compulsion but also any indirect coercion which might result from subtle discrimination."[114] The *Lyng* coercion standard, by contrast, appears to proscribe only direct compulsion. The Forest Service was not enjoined from building the G-O Road because building the road would only eliminate the religion indirectly, as opposed to directly restraining the Tribes' ability to practice their religion by physically keeping them from the land.

The majority's insensitivity toward and ignorance of Native American religions is further evidenced by the Court's statement that the Tribes' rights "do not divest the Government of its right to use what is, after all, *its* land."[115] The Tribes held this land sacred before a United States government existed, and the government obtained its interest in the land only through its historical subjugation of the Tribes.[116] As Justice Brennan points out in his dissent, the majority's statement indicates an insensitivity towards the conflict between western and Native American cultures, a conflict in which the dominant western culture views the land in terms of ownership and use, and the Native American culture views the land *itself* as sacred.[117] The Tribes sought only to preserve the natural solitude of the area, not to obtain ownership rights.[118] The *Lyng* majority, however, does not recognize *any* Tribal claim, legal or equitable, to the land.

Although grounded in prior decisions, the majority's coercion standard can be seen as a deviation from its own application of the coercion standard and thus departs from free exercise precedent. In *Sherbert v. Verner,*[119] the plaintiff challenged unemployment laws compelling her to work on Saturdays against her religious beliefs. The

112. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1160 (1988). Professor Tribe bases his historical discussion on the three opinions he perceives most greatly influenced the creation of the first amendment: the evangelical view associated with Roger Williams (a view of "positive toleration, imposing on the state the burden of fostering a climate conducive to all religion"), the Jeffersonian view (espousing a "wall of separation between Church and State" to effect the "complete separation of religion from politics"), and the Madisonian view (advancing both religious and secular interests "by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one"). *Id.* at 1158-59.

113. *Id.* at 1160.

114. *Id.* (emphasis added).

115. *Lyng,* 485 U.S at 453.

116. *See supra* Part I.B.

117. *Lyng,* 485 U.S. at 473 (Brennan, J., dissenting).

118. *See supra* note 86 and accompanying text.

119. 374 U.S. 398 (1963).

Sherbert Court established a two-prong test for determining free exercise violations. The test first examines if the governmental act in question places a burden on a person's ability to practice her religion.[120] If the act creates such a burden, it will be found unconstitutional unless the government has a compelling interest for the infringement.[121] In *Wisconsin v. Yoder,*[122] the Court struck down compulsory school attendance laws violating Amish religious practices. The Court added to the *Sherbert* test the additional requirement that a free exercise claim be based upon a genuine religious belief, rather than a personal philosophy.[123] In restating this standard, Professor Tribe lists four factors necessary for an exemption from a government requirement:

> (1) a sincerely held religious belief, which (2) conflicts with, and thus is burdened by, the state requirement. Once the claimant has made that showing, the burden shifts to the state. The state can prevail only by demonstrating both that (3) the requirement pursues an unusually important governmental goal, and that (4) an exemption would substantially hinder the fulfillment of the goal.[124]

The facts in *Lyng* support a decision that the Tribes' first amendment rights were violated under the *Sherbert-Yoder* analysis. First, the Forest Service's own report found that the Tribes' beliefs are genuinely religious.[125] Second, building the G-O Road places an impossible burden on the Tribes' ability to perform their site-specific religious ceremonies by destroying the solitude of the area, threatening the complete elimination of their religion.[126] Finally, the government cannot demonstrate any compelling interest that would justify imposing such a burden, especially in light of the prohibition of timber harvesting in the area surrounding the proposed logging road.[127]

By focusing only upon the presence or absence of direct governmental coercion, the *Lyng* majority seems to ignore the actual damage to the Tribes' ability to practice their religion. This narrow focus contradicts the *Sherbert-Yoder* test by failing to account for the magnitude of the burden placed upon the Tribes' religion.[128]

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120. *Id.* at 403.

121. *Id.* at 406; *see also* Casenote, *Unjustified Interference, supra* note 14, at 313, 321-22.

122. 406 U.S. 205 (1972).

123. *Id.* at 215-16; *see also* Casenote, *Unjustified Interference, supra* note 14 at 322-23.

124. L. TRIBE, *supra* note 112, at 1242.

125. *See generally* Theodoratus Report, *supra* note 52 (describing the Tribes' religious practice that continues to this day).

126. *See supra* text accompanying notes 84, 94.

127. *See supra* text accompanying notes 90-92.

128. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 468-69 (1988) (Brennan, J., dissenting). *Lyng* appears to mark the beginning of a trend in which the Supreme

Furthermore, the majority's reliance on *Bowen v. Roy*[129] fails to recognize the distinct nature of the government's interest in *Roy*. *Roy* was decided in accordance with the *Sherbert-Yoder* standard: the government demonstrated a compelling interest in maintaining consistent administrative records[130] and Roy's religious beliefs appeared to be as personal and philosophical as they were genuinely religious.[131] Significantly, *Roy* only addressed the government's own *internal* procedures.[132] Observing the importance of efficient recordkeeping, the disturbance of which effectively could shut down the government, the Court stated that the free exercise clause does not "require the Government to conduct *its own internal affairs* in ways that comport with the religious beliefs of particular citizens."[133] Building a logging road through land that has been declared protected wilderness does not create the kind of compelling governmental interest that justifies abrogating the Tribes' free exercise rights.[134] As Justice Brennan observed in his *Lyng* dissent, "[f]ederal land-use decisions . . . are likely to have substantial external effects that government decisions concerning office furniture and information storage obviously will not . . . ."[135] The potential for the adverse impact of such land-use decisions upon Na-

Court is eliminating the *Sherber-Yoder* test. In Oregon v. Smith, 110 S. Ct. 1595 (1990), the Court severely limited the *Sherbert-Yoder* analysis. The *Smith* Court held that members of a Native American church could be fired and denied unemployment benefits for their religious use of peyote. *Oregon*, 110 S. Ct. at 1606. Justice Scalia stated that the Court has "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation" and that "in recent years [the Court has] abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Oregon*, 110 S. Ct. at 1602. Scalia cited *Lyng* as support for this reading of the *Sherbert* analysis. The majority further held that the "first amendment's protection of religious liberty does not require" applying a "compelling interest" test to governmental actions that restrict religious practices. *Oregon*, 110 S. Ct. at 1606.

Even Justice O'Connor, author of the *Lyng* opinion, stated in her concurrence that the holding in *Smith* "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Oregon*, 110 S. Ct. at 1606 (O'Connor, J., concurring). This decision, together with *Lyng*, appears to be a dramatic step toward a complete gutting of first amendment protection for Native Americans, whose religion, perhaps more than any other, is often at odds with governmental actions.

129. 476 U.S. 693 (1985). For a discussion of the majority's reliance on *Roy*, see *supra* notes 96-107 and accompanying text.

130. *Roy*, 476 U.S. at 707.

131. Appellee Roy had recently developed the religious objection to social security numbers after consulting a tribal leader. Roy, co-appellee Miller, and their oldest daughter all had social security numbers. *Id.* at 696 n.2.

132. *Id.* at 699.

133. *Id.* (emphasis added).

134. *See supra* notes 90-91 and accompanying text.

135. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 470-71 (1988) (Brennan, J., dissenting).

tive Americans was recognized by Congress in AIRFA.[136] In Brennan's view, therefore, the comparison between purely *internal* governmental record-keeping procedures and governmental land-use decisions, which have broad *external* effects, appears "wholly untenable."[137]

Hobbie v. Unemployment Appeals Commission,[138] decided after *Roy* and before *Lyng*,[139] reaffirmed the *Sherbert-Yoder* compelling governmental interest standard. The Court in *Hobbie* rejected the *Roy* standard, which would have required only a neutral and uniform application of governmental benefits to allow denial of first amendment protection.[140] The *Hobbie* Court relied upon Justice O'Connor's dissent in *Roy,* in which she stated that "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."[141]

Justice O'Connor's later majority opinion in *Lyng* is inconsistent with her dissenting opinion in *Roy*, relied on in *Hobbie.* In *Lyng*, O'Connor contended that the first amendment cannot deprive the government of its right to build a logging road, even through land where Congress has decided that "commercial activities such as timber harvesting are forbidden."[142] In *Roy,* however, O'Connor insisted that a governmental act be "especially important" before justifying its infringement upon religious freedom.[143]

This inconsistency suggests that the reasoning in the *Lyng* decision was prompted more by the Court's admitted fear of future restrictions on governmental land use[144] than by its finding of a compelling governmental interest. The government's interest in managing the "vast tracts of federal property"[145] is certainly legitimate. It also is foreseeable that certain rulings protecting free exercise could lead to the "*de facto* beneficial ownership" of federal property by private parties as the *Lyng* majority feared.[146] The majority's finding of a compelling government interest in this case, however, seems to represent an unjustified prophylactic policy against possible Native American claims to land held by the government. The court of appeals observed that

136. *Id.* at 471 (Brennan, J., dissenting).
137. *Id.* at 472 (Brennan, J., dissenting).
138. 480 U.S. 136 (1988).
139. *Lyng,* 485 U.S. at 449-50.
140. *Hobbie,* 480 U.S. at 141.
141. *Id.* at 141-42.
142. *Lyng,* 485 U.S. at 444.
143. *Roy,* 476 U.S. at 727 (O'Connor., J., dissenting).
144. *See Lyng,* 485 U.S. at 452-53.
145. *Id.* at 473 (Brennan, J., dissenting).
146. *Id.* at 453.

the Forest Service's interest in the G-O Road was not sufficiently important to outweigh the burden on the Tribes' religion.[147] Nevertheless, the Supreme Court "disclaim[ed] all responsibility for balancing these competing and potentially irreconcilable interests"[148] instead of determining the Tribes' first amendment rights in accordance with free exercise precedent.

Finally, the *Lyng* majority appears to misinterpret Congress' intent in drafting AIRFA. AIRFA states that

> it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise [their] traditional religions . . . , including but not limited to access to sites . . . and the freedom to worship through ceremonials and traditional rites.[149]

This statement is an express application of the free exercise clause to Native Americans, in which Congress recognized that its own policies "could and often did 'intrud[e] upon [and] interfer[e] with' site-specific Native American religious ceremonies."[150] The legislative history of the act indicates that AIRFA was designed to address the "[l]ack of knowledge, unawareness, insensitivity, and neglect [which] are the keynotes of the Federal Government's interaction with traditional Indian religions and cultures."[151] The House acknowledged the failure of non-Native American government officials to recognize critical differences between Native American religion and other Western religions, noting the common perception "that because Indian religious practices are different than their own that they somehow do not have the same status as a 'real' religion."[152]

Although AIRFA arguably was not meant to create a private right of action,[153] Justice Brennan pointed out in his *Lyng* dissent that it is "an express congressional determination that federal land management decisions are not 'internal' government 'procedures,' but are instead governmental actions that can and indeed are likely to burden Native American religious practices."[154] The Court itself has noted

147. *See supra* notes 89-92 and accompanying text.

148. *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting).

149. AIRFA, 42 U.S.C. § 1996 (1988).

150. *Lyng*, 485 U.S. at 472 (Brennan, J., dissenting) (quoting Pub. L. 95-341, 92 Stat. 469 (1978)).

151. H.R. REP. No. 1308, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1265 [hereinafter HOUSE REPORT]. *See also* Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869, 878 (1986) (authored by Diane Brazen Gould).

152. HOUSE REPORT, *supra* note 151, at 4.

153. *Lyng*, 485 U.S. at 455.

154. *Id.* at 471 (Brennan, J., dissenting).

that Congress has the "necessary latitude to try new techniques . . . to accomplish remedial objectives"[155] and that the Court should exercise self-restraint in reviewing such congressional actions.[156] When viewed as a congressional finding of fact, therefore, AIRFA should be used to inform the Court's constitutional analyses of Native Americans' free exercise rights.[157]

In addressing the purpose of AIRFA, a House of Representatives report stated that "[t]he issue is *not* ownership or protection of the lands involved. Rather, it is a straightforward question of access *in order to worship and perform the necessary rites.*"[158] The *Lyng* majority, however, focused on exactly the issue that the House report deemed irrelevant: governmental ownership of the Chimney Rock area.[159] After *Lyng,* ownership, and ownership alone, is the issue. Furthermore, although the majority pointed out the Forest Service's "solicitous" approach to the problem by choosing the route that was the farthest removed from the religious sites,[160] the Court ignored the fact that, regardless of the route chosen, building the G-O Road effectively would eliminate the Tribes' ability to practice their religion.[161] This also is contrary to the congressional intent that access to sites be provided "in order to worship," not merely to look around.[162]

By creating a standard for interpreting the free exercise clause that emphasizes the government's property rights over religious rights, *Lyng* creates a bleak future for Native American religious rights. Because

155. Fullilove v. Klutznick, 448 U.S. 448, 490 (1980).

156. *Id.*

157. *See* Note, *supra* note 151, at 873-77.

158. HOUSE REPORT, *supra* note 151, at 2 (emphasis added).

159. *See supra* text accompanying notes 107, 144-148.

160. *Lyng,* 485 U.S. at 454.

161. *See* Theodoratus Report, *supra* note 52, at 422.

162. HOUSE REPORT, *supra* note 151, at 2. The Senate Select Committee on Indian Affairs held a hearing on Native American religious freedom shortly after *Lyng* was decided. *Improvement of the American Indian Religious Freedom Act: Hearing on S. 2250 Before the Senate Select Comm. on Indian Affairs,* 100th Cong., 2d Sess. 1-41 (1988). In introducing proposed amendments to AIRFA, Senator Inouye, chairman of the Committee and co-sponsor of the bill, stated that the *Lyng* decision "could undermine the ability of traditional cultures in our land to exercise essential practices." *Id.* at 2. The committee therefore felt it appropriate to reexamine AIRFA. *Id.* Senator Alan Cranston, co-sponsor of the bill, observed that although "[t]en years have passed since passage of the American Indian Religious Freedom Act . . . [f]ederal land management policies remain insensitive to Indian religions and cultural traditions . . . ." *Id.* at 9. The proposed amendment to AIRFA stated that "[e]xcept in cases involving *compelling governmental interests of the highest order,* Federal lands that have been historically indispensable to a traditional America [sic] Indian religion shall not be managed in a manner that would seriously impair or interfere with the exercise or practice of such traditional American Indian religion." *Id.* at 3-4 (emphasis added). Although this bill ultimately was not enacted into law, the Committee's introduction of this bill is further evidence that *Lyng* violated the original intent of AIRFA.

western religions are not as susceptible to government intrusions relating to land use,[163] the *Lyng* decision, by granting superior rights in land-use decisions over freedom of religion, arguably has prejudicially burdened Native Americans.

This prejudicial standard is demonstrated in *Yonkers Racing Corp. v. City of Yonkers*,[164] a federal appellate court decision relying in part on *Lyng*.[165] The *Yonkers Racing* court considered a case in which the City of Yonkers sought to acquire two acres of land on the border of a seminary's forty-four-acre property to comply with Department of Housing and Urban Development standards for public housing. The district court permitted the city to pursue eminent domain proceedings against the seminary.[166] The seminary argued that those proceedings would violate its rights under the first amendment because the two acres formed an "'apron' of quietude"[167] surrounding the seminary, contributing an atmosphere of quiet reflection essential to the development of young men preparing for the priesthood.[168] It was further argued that the city's acquisition of the two-acre site would substantially affect the seminary's work.[169]

The *Yonkers Racing* court applied the *Lyng* coercion standard to the eminent domain proceedings and granted relief to the seminary.[170] The court distinguished the seemingly indistinguishable factual situations in *Lyng* and in *Yonkers Racing* by stating that "the government's use of *its property* involves significantly different considerations than the taking by the government of privately-owned religious property."[171] Although the intrusion on the seminary's religious practice was less severe than that in *Lyng*, given that the eminent domain proceedings would not have eliminated the seminarians' ability to practice Catholicism, the court granted first amendment protection to the seminary simply because it owned the property that was the subject of the dispute.

The *Yonkers Racing* decision illustrates the defective and possibly politically motivated nature of the *Lyng* coercion standard. When property is at the center of the dispute (as it will be for any site-specific

163. If the government were to close a particular Christian church, for instance, its parishioners most likely could attend services at another church of the same denomination.

164. 858 F.2d 855 (2d Cir. 1988).

165. *Id.* at 870-71.

166. *Id.* at 861.

167. *Id.* at 869-70 (quoting Monsignor Edwin O'Brien, Rector at St. Joseph's Seminary and College in Yonkers, New York).

168. *Id.*

169. *Id.*

170. *Id.* at 868.

171. *Id.* at 871 (emphasis added).

religion) the effect of that standard is to grant relief under the first amendment based not on the scope of intrusion into religious practices, but on the ownership of property in question. Native Americans necessarily will be discriminated against under such a standard because the government controls much of the Native American sacred land: either it actually owns the land (as in the Chimney Rock area), or it may arbitrarily terminate a tribe's right to enjoy such lands.[172] *Lyng*, therefore, presents little hope to Native Americans of ever receiving equitable treatment under the first amendment.[173]

This hostile domestic environment makes redress for Native Americans through international venues important. The Tribes have filed a petition with the Commission, alleging violations of their international human rights. Although this action may be rendered moot by pending legislative action that would provide relief for the Tribes,[174] the discussion that follows is important for groups that may be faced with similar violations of their human rights by domestic courts in the future.

III. Pursuing International Redress: Filing an Action Before The Commission

The Commission is particularly appropriate for United States citizens or groups of citizens who are seeking international redress for human rights violations. In fact, other venues may not be available to these individuals and groups. For instance, the International Court of Justice in The Hague is open only to parties that are member countries of the United Nations.[175] It will not accept complaints from in-

172. Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 113-14 (1983). Barsh observes that the "tribes' right to enjoy aboriginal lands depends today to some extent on 'recognition' by the United States and may be terminated, with more or less compensation, at the pleasure of Congress for any purpose, including the protection of non-Indian trespassers and private profit." *Id.* "In this scheme, tribes enjoy only what has not yet been taken away, which cannot properly be described as a 'right' at all." *Id.* at 103.

173. Another example of the application of this discriminatory standard is United States v. Means, 858 F.2d 404 (8th Cir. 1988), another decision based in part upon *Lyng*. The *Means* court, in denying a group of Sioux Indians a special use permit for the establishment of a religious camp, relied upon the fear in *Lyng* of granting *de facto* ownership of government-owned land to Native Americans. *Id.* at 407. This decision was somewhat less egregious than *Lyng* only because the court found that the site upon which the Sioux wished to establish their camp did not have *specific* religious significance to them. *Id.* at 407 n.4.

174. *See supra* note 16.

175. INDIAN LAW RESOURCE CENTER, INDIAN RIGHTS-HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURES 22-23 (1984) [hereinafter INDIAN RIGHTS HANDBOOK].

dividuals or groups.[176] Similarly, the complaint procedure before the International Labor Organization, an agency of the United Nations, is open only to governments, trade unions, and employee associations, or delegates to the International Labor Conference.[177]

Even those international procedures that are open to individuals often are not practical for hearing certain types of violations. For example, the United Nations has established a procedure,[178] involving "the entire hierarchy of the UN's human rights organs,"[179] that is "designed for consideration of systematic, massive violations of human rights."[180] Because complaints under the "1503 procedure" will not be considered if they address only individual or isolated violations of rights,[181] and because most of the proceedings "are kept secret from the public and from the party who filed the complaint,"[182] this 1503 procedure most likely is "not the way to get Indian [or individual] human rights concerns before the highest United Nations bodies."[183] Although complaints are allowed under the International Covenant on Civil and Political Rights,[184] complaints may be made only against "those countries which have ratified the 'Optional Protocol'" to the Covenant.[185] The United States is not one of those countries.[186]

Because of these restrictions, the complaint procedure before the Commission "may be the most convenient and useful international procedure for Indians" and for United States individuals with international grievances against the United States.[187] For this reason, and because the Tribes actually have filed a petition before the Commission, this Note will focus on filing a complaint before the Commission.[188]

176. *Id.*

177. Swepston, *Human Rights Complaint Procedures of the International Labor Organization,* in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 74-75 (H. Hannum ed. 1984); *see also infra* note 246 (describing the International Labor Organization).

178. E.S.C. Res. 1503, 48 U.N. ESCOR Supp. (No. 1A) at 8, U.N. Doc. E/4832/Add. 1.

179. Shelton, *Individual Complaint Machinery Under the United Nations 1503 Procedure and the Optional Protocol on Civil and Political Rights,* in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 31, at 60.

180. *Id.*

181. INDIAN RIGHTS HANDBOOK, *supra* note 175, at 32.

182. *Id.* at 33.

183. *Id.* at 34.

184. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

185. INDIAN RIGHTS HANDBOOK, *supra* note 175, at 36. The United States, however, has not ratified the International Covenant on Civil and Political Rights. See *infra* note 216 for a discussion of international findings under that Covenant.

186. *See* Strossen, *supra* note 28, at 810 n.20.

187. INDIAN RIGHTS HANDBOOK, *supra* note 175 at 38.

188. The other international procedures discussed are available in certain cases, and *all*

The Commission has the authority to hear petitions containing allegations of human rights violations by OAS member states.[189] If the Commission finds that violations have occurred, it will recommend remedial measures to the member state in violation.[190] If the member state does not adopt the Commission's recommended measures, the Commission may publish its decision in its annual report to the OAS General Assembly.[191] Publication means unfavorable publicity for the violator.[192] Additionally, the Commission's investigation into the allegations gives notice to the member state that an impartial, intergovernmental body has taken an interest in its actions.[193] A published human rights violation finding by the Commission can be more than a moral victory for the petitioner because it publicly denounces the member state's actions, which may result in that state curing the violation.[194]

The following regulations of the Commission describe the procedures for petitioning the Commission. "Human rights," for purposes of filing before the Commission, are set forth in two documents:[195] the American Convention on Human Rights (American Convention),[196] and the American Declaration of the Rights and Duties of Man (American Declaration).[197] A petitioner first must ascertain whether the member state accused of the violation is a party to the American Convention.[198] If the member state is not a party to the American Convention, then the petitioner's complaint must be based upon a violation of rights contained in the American Declaration.[199]

potential venues should be considered when seeking international redress for human rights violations. For a more comprehensive discussion of these venues, see generally GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 31; and INDIAN RIGHTS HANDBOOK, *supra* note 175.

189. *IACHR Regulations, supra* note 17, art. 51, at 94.

190. *Id.* art. 53(1), at 94.

191. *Id.* art. 53(4), at 94.

192. Norris, *Bringing Human Rights Petitions Before the Inter-American Commission,* 20 SANTA CLARA L. REV. 733, 753 (1980).

193. *Id.*

194. *Id.*

195. *Statute of the Inter-American Commission on Human Rights,* art. 1(2), *reprinted in* BASIC DOCUMENTS, *supra* note 7, at 65.

196. Nov. 22, 1969, 9 I.L.M. 673, *reprinted in Basic Documents, supra* note 7, at 25-53. The United States signed this Convention but never ratified it.

197. May 2, 1948, *reprinted in* BASIC DOCUMENTS, *supra* note 7, at 17-24.

198. Norris, *supra* note 192, at 735.

199. *Id.* The filing procedure is as follows: any person, group of people, or legally recognized nongovernmental organization may submit a petition to the Commission, alleging violations of the human rights contained either in the American Convention or the American Declaration. *IACHR Regulations, supra* note 17, art. 26(1), at 84. The petitioner must identify herself, the victim, the member state charged with the violation, and the nature of the

Because the United States is not a party to the American Convention, allegations of United States violations must be framed in terms of the provisions of the American Declaration. The language of the American Declaration, however, is necessarily broad; it declares inalienable rights,[200] as the United States Constitution does. The Commission therefore often will look outside the document to determine the scope of the rights in question. Although the Commission looks first to OAS instruments for a statement of legal rights that is pertinent to the complaint submitted, it also may look to other pertinent international documents.[201]

The Commission also may consider violations of either customary international law or *jus cogens,* laws which may be found in any or all of the major international human rights instruments of the world.[202] The Commission has identified four elements of a norm of customary international law.[203] First, there must be a "concordant practice by a number of states with reference to a type of situation falling within the domain of international relations."[204] Second, there must be "a continuation or repetition of the practice over a considerable period of time."[205] Third, there must be "a conception that the practice is

complaint. *Id.* art. 32, at 86; *see also* Norris, *supra* note 192, at 740 (describing the filing procedure and containing a sample first paragraph for a petition). The complaint must contain a statement of facts, describing the act being denounced and the place and date of the alleged violations. *IACHR Regulations, supra* note 17, art. 32(b), at 86. The petition also must state that all remedies under domestic law have been exhausted. *Id.* art. 32(d), at 86; *id.* art. 37, at 88. Finally, the petition should state that the subject of the petition is not pending settlement before another international governmental organization, *id.* art. 39, at 89, and that the filing is timely. *Id.* art. 38, at 89.

200. For example, the preamble to the American Declaration states that "[a]ll men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another." American Declaration, *supra* note 197, preamble, para. 1.

201. *See, e.g.,* Case 7615, INTER-AM. C.H.R. 24, 31, OEA/ser. L./V./II.66, doc. 10 rev. 1 (1985) [hereinafter *Yanomami Indian Case*] (citing the International Covenant on Civil and Political Rights, *supra* note 184, in determining that the government of Brazil had violated the human rights of an indigenous population, the Yanomami Indians, as set forth in the American Declaration).

202. INDIAN RIGHTS HANDBOOK, *supra* note 175, at 38. Even though a nation may not be bound by a document such as the American Convention because it has not ratified that document, the presence of a right in an international instrument such as the American Convention is evidence that that right has achieved *jus cogens* status. *See supra* notes 37-46 and accompanying text. Universal jurisdiction is created for violations of a group's right to self-determination, *apartheid* (Apartheid Convention, *infra* note 260, art. 5), and genocide (Genocide Convention, *infra* note 280, art. VI, at 280). Therefore, the Commission may hear complaints alleging such violations.

203. *Roach Death Penalty Case, supra* note 20, at 166.

204. *Id.*

205. *Id.*

required by or consistent with prevailing international law."[206] Finally, there must be "general acquiescence in the practice by other states."[207] Once a finding has been made that a law is a customary norm, the next step is to find that it has achieved the status of *jus cogens* for it to bind a state that protests the norm.[208] The Commission has adopted the definition of *jus cogens* from the Vienna Convention[209] as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[210] Once the Commission has found that a customary norm is *jus cogens,* no derogation of that norm is permitted.[211]

Under these international standards, the United States government's actions can be seen as violations of the Tribes' fundamental human rights, rights that are *jus cogens.*

IV. Specific International Human Rights Violations in the *Lyng* Decision

The *Lyng* decision essentially violates the Tribes' right to self-determination and commits *apartheid* and genocide. These are violations of group, rather than individual, rights. Before discussing the violations of specific rights belonging to the Tribes, therefore, it may be helpful to discuss the collective nature generally of the rights of indigenous peoples.

A panel of experts supported by the United Nations Educational, Scientific and Cultural Organization ("UNESCO") recently observed that "[t]he notion of peoples' and human rights are distinct. Although each is an aspect of the international 'rights' debate, and each ultimately impinges on individual human beings, the two concepts should not be confused."[212] The two are interrelated, however: "A full enjoyment of individual human rights will not be possible if the people, of whom the individual is one, is denied its rights . . . ."[213] This distinction is particularly important for indigenous populations. For ex-

206. *Id.*
207. *Id.*
208. *Id.* at 168.
209. *See supra* note 15.
210. *Roach Death Penalty Case, supra* note 20, at 168 & n.2.
211. *Id.* at 168.
212. *International Meeting of Experts on Further Study of the concept of the Rights of Peoples,* at para. 14, UN Doc. SHS-89/CONF.602/7 (1990).
213. *Id.*

ample, the panel of experts observed that nations "may exhibit indifference to minorities within its borders, particularly where a minority is a powerless indigenous people whose rights come into apparent conflict with the perceived needs of economic development."[214] As the statements by these experts suggest, any discussion of the rights of indigenous peoples (such as any Native American tribe) must be framed at least partially in terms of their group, rather than individual, rights. This may lead to confusion and conflict in the United States legal environment, one that emphasizes the rights of individuals.[215]

It is important also to recognize that the rights of indigenous populations under international law must be reevaluated continually, and in light of new domestic developments, to ensure that continuing encroachment into ancestral lands does not constitute a violation of those rights. For instance, the United Nations Human Rights Committee recently determined that the Canadian government had violated the right to culture of an indigenous population by leasing the tribe's land for a commercial timber project.[216]

As this discussion suggests, the recognition and protection of indigenous peoples' group rights requires a sensitivity that the United States government has not demonstrated, either historically or in current actions such as the *Lyng* decision. This kind of insensitivity can result in violations of the basic human rights of indigenous peoples such as the Tribes. Perhaps the most basic of these violations is the

214. *Id.* para. 4. The validity of any determinations by UNESCO in this field probably will be questioned by the United States because it has withdrawn from that organization. Specifically, "reservations about the concept of peoples' rights as discussed in the context of UNESCO were amongst the reasons given for [that] withdrawal." *Id.* at para. 14.

215. The United States, however, insisted that language ensuring the human rights of peoples, as opposed to states, be included in the United Nations Charter, and the State Department itself has admitted the presence of a right of self-determination. *Id.* paras. 17-18.

216. *Decisions, Communication No. 167/1984,* U.N. Doc. CCPR/C/38/D/167/1984 (1990). The tribe in question, the Lubicon Lake Band, is a "self-identified, relatively autonomous, socio-cultural and economic group" living in Northern Alberta that "speak[s] Cree as [its] primary language." *Id.* at 2. The Lubicon Lake Band alleged that the Canadian government leased virtually all of the traditional Lubicon land for a commercial timber project. *Id.* at 22. The Lubicon Lake Band also alleged that "[t]his economic activity, if proceeding unabated, would . . . continue to destroy the traditional lifeground of the Lubicon community." *Id.* at 23. The United Nations Human Rights Committee found that the "recent developments" of the commercial timber projects, as well as historical inequities, "threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation" of the band's right to culture "so long as they continue." *Id.* at 29. The United Nations Human Rights Committee determined that the acts of the Canadian government were violations under Article 27 of the International Covenant on Civil and Political Rights. *Id.*

Unfortunately, the Tribes may not raise similar allegations because the United States has not ratified that Covenant. *See supra* note 186. The determination by the United Nations Human Rights Committee is important to the Tribes, however, to the extent that it reinforces the rights of indigenous populations to culture under international law.

failure to recognize the existence of the group at all: the denial of the group's right to self-determination.

A. *Lyng*: Denial of the Tribes' Right to Self-Determination

The right to self-determination is the collective right of a people to choose their political status and to pursue their economic, social, and cultural development freely without discrimination on the grounds of race, religion, or color.[217] Although the right to self-determination was centered initially on the rights of a people to be free from colonialism and to pursue their own sovereignty and economic development,[218] the right consistently is extended to include the social and cultural aspects of a people.[219]

Because the right to self-determination profoundly affects the lives of peoples, it has been invoked more than any other charter principle of international law.[220] Articles of the American Declaration promoting the right to self-determination include those setting forth the right to equality before the law,[221] the right to religious freedom and worship,[222] the right to the benefit of culture,[223] and the right to the use of free time to pursue spiritual, cultural, and physical benefit.[224]

The right to self-determination has been emphatically labelled *jus cogens* by Special Rapporteur Mr. Gros Espiell, author of a landmark report on the subject.[225] Moreover, because it is featured prominently in major United Nations human rights instruments, it fits the Commission's description of a customary norm of international law; it is required by international law and it has been continually practiced, or its practice has been acquiesced to, by most of the nations of the world.[226] Additionally, the *Restatement (Third) of Foreign Relations*

217. A. CRITESCU, THE RIGHT TO SELF DETERMINATION at 32, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, U.N. Sales No. E.80.XIV.3 (1981).

218. *Id.* at 44-45.

219. *Id.* at 45.

220. American Declaration, *supra* note 197, art. II, at 18.

221. *Id.* art. III, at 19.

222. *Id.* art. XIII, at 20.

223. *Id.* art. XV, at 21.

224. It figures prominently in the United Nations Charter, U.N. CHARTER art. 1, para. 2, art. 55; it is the first right set out in the two major international treaties, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 1, International Covenant on Civil and Political Rights, *supra* note 184, art. 1; and it appears prominently in many other international instruments. H. GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS at 8, U.N. Doc. E/CN.4/Sub.2/405/Rev. 1, U.N. Sales No. E.79.XIV.5 (1980).

225. H. GROS ESPIELL, *supra* note 224, at 11-13.

226. Mr. Critescu observes that the member states of the United Nations pledge, in Article

Law has stated that systematic racial discrimination, a term that can be used to describe a violation of the right to self-determination, violates *jus cogens*.[227]

An important threshold question in determining whether a group may claim a violation of its right to self-determination is whether or not it is a "people."[228] Recent United Nations actions provide the answer to that question for the Tribes. In 1982, the United Nations Economic and Social Council established the Working Group on Indigenous Populations.[229] Mr. Jose R. Martinez Cobo, Special Rapporteur of the Working Group, defined indigenous populations as those that have an historical continuity with pre-invasion and pre-colonial societies that developed on their territories and, consequently, consider

56 of the United Nations Charter, "'to take joint and separate action in co-operation with the Organization' for the purpose *inter alia* of developing universal respect for human rights and fundamental freedoms" including the right to self-determination. A. CRITESCU, *supra* note 217, para. 219-20.

227. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, cl. (f) (1987) [hereinafter RESTATEMENT (THIRD)].

228. This is not a simple question. In his landmark report on the right to self-determination, Hector Gros Espiell, Special Rapporteur for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, observes that characterizing rights as collective and possessed by peoples raises awkward theoretical problems. H. GROS ESPIELL, *supra* note 224, at 9-10. His solution is to avoid the problem by viewing self-determination as a right primarily belonging to individuals. *Id.* at 9.

Mr. Aureliu Critescu, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, addresses this distinction differently. A. CRITESCU, *supra* note 217. Mr. Critescu observes that the right to self-determination could be turned into a weapon against a state's territorial integrity and unity if it encourages secessionist movements in the territory of independent states. *Id.* at 40. Noting the import of this fear with regard to minorities invoking the right, he cites the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,* G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 124, U.N. Doc. A/8028 (1970), which states:

> "nothing [in the Declaration regarding principles of self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing a whole people belonging to the territory without distinction as to race, creed or colour."

Id.

As Mr. Critescu's report demonstrates, the definition of "peoples" can be particularly problematic. Under a "territorial integrity [and] political unity" argument, if Native Americans are found to be a minority rather than a people, the United States would have wider latitude to enforce (or not to enforce) Native Americans' international human rights.

229. E.S.C. Res. 1982/34, 1982 U.N. ESCOR Supp. (No. 1) at 26, U.N. Doc. E/1982/82 (1982). The Working Group was established specifically to "give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world." *Id.* at 27.

themselves distinct from other sectors of the societies now prevailing in those territories.[230]

The Tribes have historical continuity with the Chimney Rock area: they historically have used and continue to use the Chimney Rock area for sacred and ceremonial purposes.[231] The Forest Service's archaeological research indicates that the prehistory of northwest California (which includes the Chimney Rock area), as distinguished from other parts of the state, is unique.[232] Furthermore, the Tribes currently are involved in negotiations with the United States government to establish their own lands as a reservation.[233] This demonstrates their desire to distinguish themselves physically from society around them. Under Mr. Martinez Cobo's definition, therefore, the Tribes are an indigenous population. As an "indigenous population," the Tribes are "peoples" as defined by the United Nations Working Group on Indigenous Populations.[234]

The Tribes need not rely on international standards alone to establish themselves as peoples. The Supreme Court historically has recognized Native Americans as peoples. In 1831, Chief Justice Marshall stated:

> [t]he numerous treaties made with [the various tribes] by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed

230. J. MARTINEZ COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS at 29, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987). "Historical continuity" consists of one or more of the following factors: occupation of ancestral lands, or at least part of them; common ancestry with the original occupants of these lands; culture in general, or in specific manifestations such as religion; language; residence in certain parts of the country; and other relevant factors. *Id.*

231. *See* Theodoratus Report, *supra* note 52, at 416.

232. *Id.* at 417.

233. *See generally Yurok Reservation Hearing, supra* note 79 (describing the Yurok efforts to have certain lands set aside as a Yurok reservation).

234. The Working Group has since adopted the term "indigenous peoples" rather than "indigenous populations." *Discrimination Against Indigenous Populations,* at 18, U.N. Doc. E/CN.4/Sub.2/1988/24 (1988) [hereinafter *Sixth Session Report*]. This "crucial" distinction was reaffirmed in a United Nations seminar on the effects of racial discrimination on indigenous peoples. *Advisory Services in the Field of Human Rights,* at 6, U.N. Doc. E/CN.4/1989/22 (1989) [hereinafter *Seminar Report*]. During the general discussion at the seminar, the "greater tendency to favour the term 'indigenous peoples' over the term 'indigenous populations', especially as it reinforces the right to self-determination" was noted. *Id.* The seminar report stated categorically that "[i]ndigenous peoples are not racial, ethnic, religious and linguistic minorities." *Id.* at 11. The seminar report concluded that "[i]ndigenous identity and cultural survival has been threatened through the deprecation and suppression of indigenous languages, spiritual and religious practices." *Id.* at 10. Whatever the distinction is between "minorities" and "peoples," *see supra* note 228, indigenous populations are "peoples" and should receive international human rights protection.

> on the citizens of the United States by any individual in their community . . . .[235]

The Court has continued to follow this characterization in recent cases.[236]

Furthermore, federal control over Native American tribes does undermine their status as peoples.[237] Although Congress claims the authority under its plenary power to remove certain aspects of Native American sovereignty, Native American tribes are still "unique aggregations possessing attributes of sovereignty over both their members and their territory."[238] The historical treatment of Native Californians indicates that the federal government has recognized them as peoples.[239] Because the Tribes are peoples both under international law and as recognized by the United States government, they are entitled to the right of self-determination.

The right to self-determination is not limited to the right to political and economic autonomy;[240] it also implies recognition of a people's right to regain, enjoy, and enrich its cultural heritage.[241] This is significant for Native Americans and the Tribes in particular. These peoples are not in a position to seek political or economic independence because they have little if any control over their ancestral lands. Mr. Martinez Cobo concluded:

> [u]ntil the sacred lands, places and sites of indigenous populations are returned to them so that they may keep and care for them in accordance with their norms, such populations must be guaranteed access to the sacred lands and places and to the natural products of such places which are necessary for their religious practices. Access to such products must be facilitated and exempted to the greatest possible extent from the effect of limitations, restrictions or controls imposed on such areas for other justified reasons.[242]

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235. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

236. *See, e.g.*, Washington v. Washington Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) (stating that a treaty between the United States and a Native American tribe is essentially a contract between two sovereign nations).

237. United States v. Wheeler, 435 U.S. 313, 322 (1978) (stating that although they are subject to federal control, Native Americans remain a separate people with the power to regulate their social relations).

238. *Id.* at 323.

239. In 1851 the federal government negotiated treaties with Native Californians and began to establish reservations for them, as they did with many other Native American tribes. *See supra* notes 72-77 and accompanying text. The negotiations were broken off, however, due to a lack of funds and because the population of Native Californians drastically decreased. *Id.*

240. *See supra* text accompanying notes 218-219.

241. H. GROS ESPIELL, *supra* note 224, at 77; *see also* A. CRITESCU, *supra* note 217, at 102 (defining culture as "the sum total of material and spiritual values created by man in the process of socio-historical evolution").

242. J. MARTINEZ COBO, *supra* note 230, ch. XV, at 43.

Although the G-O road would not eliminate the Tribes' physical access to the sacred land, the road would affect the "natural products" of the land by altering its physical nature.[243] Specifically, the solitude of Chimney Rock, which the G-O Road would destroy, is such a "natural product."

In an effort to secure guaranteed access, the Draft Indigenous Rights Declaration sets forth "[t]he right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect and have access to sacred sites" for indigenous peoples.[244] Further, the Indigenous and Tribal Peoples Convention,[245] adopted by the International Labour Conference,[246] recognizes the aspirations of indigenous populations to "maintain and develop their identities, languages and religions,"[247] and mandates government respect for "the special importance for the cultures and spiritual values" that are tied to land occupied by indigenous populations.[248]

The Commission has recognized this right to culture for indigenous populations. In 1985, the Commission found that the government of Brazil had violated the international human rights of the Yanomami Indians.[249] Interestingly, the violation began when the government built a road through Yanomami land.[250] The Commission noted that "international law in its present state . . . recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for

243. *See supra* text accompanying notes 84-86.

244. *Discrimination Against Indigenous Populations*, at 3, U.N. Doc. E/CN.4/Sub.2/1988/25 (1988) [hereinafter *Draft Against Indigenous Rights Declaration*]. A first reading of this paragraph might suggest that the *Lyng* decision does not violate this right because *Lyng* does not prevent access. However, the clause, "access to sacred sites . . . *for these purposes*," *id.* (emphasis added), discloses the decision's fault. Because the Tribes cannot worship at the site, they no longer have *spiritual* access to it.

245. Convention Concering [sic] Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, 28 I.L.M. 1382 [hereinafter Indigenous and Tribal Peoples Convention]. The United Nations Economic and Social Council recognized that this convention was "carried out in full collaboration and consultation with United Nations agencies and other concerned bodies, particularly the Working Group on indigenous populations of the Subcommission on the Prevention of Discrimination and Protection of Minorities." *Implementation of the International Covenant on Economic, Social and Cultural Rights*, at 2, U.N. Doc. E/1990/9 (1990).

246. The International Labor Conference is composed of representatives of member states to the International Labor Organization (ILO), and is one of the ILO's three organs. Swepston, *supra* note 177, at 75. The ILO was established in 1919 by the Treaty of Versailles, and is the only surviving element of the League of Nations. *Id.* at 74. It became a specialized agency of the United Nations in 1945, and was awarded the Nobel Peace Prize in 1969. *Id.* at 75.

247. Indigenous and Tribal Peoples Convention, *supra* note 245, preamble, at 1384.

248. *Id.* art. 13, at 1387. *See generally id.* arts. 13-19, at 1387-88.

249. *Yanomami Indian Case*, *supra* note 201, at 33.

250. *Id.* at 32.

all those characteristics necessary for the preservation of their cultural identity."[251]

These findings, together with the Commission's determination that Brazil violated the Yanomami's right to life, liberty, and personal security, to residence and movement, and to health and well-being,[252] amount to a ruling by the Commission that Brazil violated the Yanomami's right to self-determination. The Commission found the existence of this right without finding a right to independent sovereignty; rather, the Commission effectively protected the Yanomami's right to exist as an independent group.

Under these standards, the United States government arguably violated the Tribes' right to self-determination by denying them what is perhaps their last vestige of cultural identity following their subjugation by white settlers: the ability to practice their religion.[253] After *Lyng,* the Tribes no longer are guaranteed their ability to preserve their cultural identity; their lives as groups could simply end.[254]

All nations have a legal duty to respect self-determination.[255] A state cannot defeat self-determination claims with the defense of territorial integrity unless it truly represents all its peoples.[256] This characterization is important for Native Americans. The United States is obligated to follow the American Declaration, which includes the right to self-determination.[257] Congress and the Supreme Court continually have abrogated their duties to respect Native American self-determination: the Court by deeming Native American rights "at the sufferance of Congress,"[258] and Congress through the plenary power doctrine.[259] By recognizing Native Americans as a separate people with whom the United States Government may negotiate, the United States cannot truly be said to represent Native Americans. Thus, Native Americans in general, and the Tribes in particular, should be granted international redress for violations of their right to self-determination whenever they occur. They should not be restrained by the shackles of domestic law as interpreted by decisions such as *Lyng.*

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251. *Id.* at 31.

252. *Id.* at 33.

253. *See supra* notes 72-82 and accompanying text.

254. As previously discussed, the Tribes' culture is intimately connected to their use of their ancestral lands. *See supra* notes 53-62 and accompanying text. To deny the ability to such use is to deny the right to maintain a cultural identity.

255. H. GROS ESPIELL, *supra* note 224, at 13.

256. *Id.* at 10.

257. *See supra* notes 220-223 and accompanying text.

258. United States v. Wheeler, 435 U.S. 313, 323 (1978).

259. *See* Barsh, *supra* note 172, at 102-10 (describing the gradual expansion of congressional plenary power over Native American Tribes).

B. *Lyng: Apartheid* for the Tribes

In addition to denying the Tribes their right to self-determination, the United States government in the *Lyng* decision arguably created a standard for religious rights so prejudicial that it can be seen as a form of *apartheid.* In 1973, the United Nations General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[260] (*Apartheid* Convention), which defines the term "crime of *apartheid*" as any one of six acts, including

> [a]ny legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms . . .[261]

Nearly every agency and organization within the United Nations system has been involved in the campaign against *apartheid.*[262] The American Declaration recognizes the crime of *apartheid* as a violation of the right to equality before the law.[263]

Freedom from *apartheid* is *jus cogens* because *apartheid* is a crime against humanity;[264] it has been denounced repeatedly and emphatically as a gross violation of human rights, qualifying it as a norm of customary international law before the Commission.[265] The *Restatement (Third) of Foreign Relations Law*'s characterization of systematic racial discrimination as *jus cogens*[266] can be applied to *apartheid* as well as to the right of self-determination.

In an effort to define more clearly the crime of *apartheid,* Arthur Goldberg, Permanent Representative of the United States to the United Nations and former Supreme Court Justice, developed a set of principles against which laws must be tested to determine whether they violate international law.[267] "Discrimination based on race, color, na-

260. Nov. 30, 1973, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

261. *Id.* art. 2, at 76.

262. UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, ch. 5 at 95-96, UN Doc. ST/HR/2/Rev.3, U.N. Sales No. E.88.XIV.2 (1988). This campaign began in 1946, has been discussed in numerous General Assembly sessions, and has been the subject of many General Assembly resolutions. *Id.* ch. 5, at 96-97.

263. American Declaration, *supra* note 197, art. II, at 26.

264. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 11, 1970, art. 1(b), at 75, 754 U.N.T.S. 73 [hereinafter War Crimes Convention].

265. *See, e.g.,* Parker & Neylon, *supra* note 15, at 439-40 (describing the general international condemnation of *apartheid*).

266. *See supra* note 227 and accompanying text.

267. Goldberg, *The Status of Apartheid Under International Law,* 13 HASTINGS CONST.

tional or social origin is illegitimate in almost all circumstances"[268] because it denies the fundamental right of self-determination,[269] and, moreover, it "denies the principle of equality in dignity and rights to which every human is entitled."[270] "[R]ecognition of these universally recognized fundamental principles imposes on States living in accordance with international law the obligation to eradicate such discrimination from their legal and economic systems" through positive steps.[271]

Applying these principles to United States Supreme Court decisions such as *Lyng* seems to reveal that the United States government commits the crime of *apartheid* when it allows its land-use decisions to override the basic human rights of one of its peoples. The inadequate protection of the Tribes' site-specific religion arguably created a preferential standard for non-site-specific religions.[272] This discrimination can be seen as violating the Tribes' right to self-determination.[273] The Supreme Court in *Lyng* denied the equality of the dignity and rights of Native Americans by putting governmental property rights, even those of relatively little importance, ahead of the Native Americans' right to practice their religion.[274] The *Lyng* Court had an opportunity to help alleviate deeply rooted historical discrimination against Native Americans; it exacerbated that discrimination instead. Finally, the Court ignored the positive steps that Congress took in drafting AIRFA to eradicate discrimination against Native Americans.[275]

Recent attempts by Native Americans to use government-held land for religious purposes have been defeated when lower courts have allowed the federal government to implement land-use decisions that adversely impact upon Native American religious practices.[276] In each

L.Q. 1, 5-6 (1985). Justice Goldberg recognized that the crime of *apartheid* was first defined in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Prevention and Punishment of the Crime of Genocide. *Id.* at 1-5. This recognition is further evidence of *apartheid*'s status as *jus cogens*.

268. *Id.* at 6.

269. *Id.*

270. *Id.*

271. *Id.* In his article, Justice Goldberg finds that the South African laws of *apartheid* are inconsistent with these principles. *Id.* at 7-8.

272. *See supra* notes 163, 172-173 and accompanying text.

273. *See supra* Part IV.A.

274. *See supra* note 163 and accompanying text.

275. *See supra* notes 149-162 and accompanying text.

276. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 738-39 (D.C. Cir. 1983) (allowing the clearing of 50 acres of forest to build ski runs); Sequoyah v. Tennessee Valley Auth., 620

of these cases, the courts held in favor of the government because the Native Americans could not demonstrate that the sites in question were "indispensable" to their religions,[277] despite the intrusion in each case upon what was recognized by the court as sacred tribal land with special geographic significance.[278] The difficult burden of proof inherent in this indispensability standard is demonstrated by the fact that none of the tribes in these cases was able to prevail on its claim despite the importance of each site to its religion, and suggests that the courts were unwilling to allow Native American claims to supersede governmental land-use decisions unless absolutely necessary. Viewed in light of these past decisions, the *Lyng* Court's insistence on the government's right to "what is, after all, *its* land,"[279] is merely a restatement of a principle of discrimination that has pervaded the government's dealings with Native Americans. To the extent that *Lyng* supports the principle that government land-use decisions override Native Americans' claim to land for religious purposes, it is an example of *apartheid.*

The ramifications of both the government's treatment of the Tribes and the Supreme Court's decision in *Lyng*, however, arguably extend beyond a denial of the Tribes' right to self-determination or the committing of *apartheid.* Without the use of their sacred lands, the Tribes effectively will suffer cultural genocide.

C. *Lyng*: Cultural Genocide or "Ethnocide" Against the Tribes

In 1948, the United Nations General Assembly adopted the Genocide Convention,[280] which defines genocide as any one of five types

F.2d 1159, 1160-61 (6th Cir. 1980) (allowing the flooding of sacred Native American burial grounds for the construction and operation of a dam); Crow v. Gullet, 541 F. supp. 785, 788 (D.S.D. 1982) (allowing the building of "roads, bridges, parking lots and other access facilities" on "the most significant site of Lakota religious ceremonies").

277. *Wilson,* 708 F.2d at 744; *Sequoyah,* 620 F.2d at 1164; *Crow,* 541 F. Supp. at 792.

278. *Wilson,* 708 F.2d at 742; *Sequoyah,* 620 F.2d at 1162-63; *Crow,* 541 F. Supp. at 788.

279. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

280. Convention on the Crime and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. President Reagan signed the Genocide Convention Implementation Act on November 4, 1988, enabling the United States to become the ninety-eighth party to the Genocide Convention. *United States: Genocide Convention Implementation Act of 1987,* 28 I.L.M. 754, 754 (1989) (Introductory Note by Christopher Joyner). Senate approval of United States ratification of the Genocide Convention was subject to eight attachments: two reservations, five understandings, and one declaration. *Id.* at 755. The two reservations "are intended to modify the legal effects exerted by certain terms of the Treaty." *Id.* The first stipulates that the International Court of Justice has no jurisdiction over the United States under the convention unless the United States consents to appear. *Id.* The second "rebuts any inference that the Treaty might confer upon the U.S. government

of acts, including "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: . . . Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[281] The Convention states that genocide "is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world."[282] Genocide is "the ultimate crime and the gravest violation of human rights it is possible to commit."[283]

Freedom from genocide has been recognized explicitly as *jus cogens* by the Commission.[284] Moreover, the right to life appears prominently in the major human rights instruments already discussed.[285] The American Declaration establishes the right to life[286] and the right to the benefits of a culture,[287] rights whose violation constitutes genocide. As in the cases of self-determination and *apartheid,* the *Restatement (Third) of Foreign Relations Law* lists genocide as a violation of a peremptory norm or *jus cogens.*[288]

The Draft Indigenous Rights Declaration, building on the genocide concept, sets forth the rights of indigenous peoples to protection against "ethnocide," which it defines as "any act which has the aim or effect of depriving [indigenous peoples] of their ethnic characteristics or identity, of any form of forced assimilation or integration, of imposition of foreign life styles and of any propaganda directed against them."[289] When ethnocide amounts to genocide, it must be condemned as genocide.[290]

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undue authority in enforcing the Convention's provisions such that they violate the safeguards guaranteed by the U.S. Constitution." *Id.* Under these reservations, it would be possible for the President or Congress to commit a genocidal act, and the judiciary to be prevented from redressing that act because it was committed pursuant to a constitutional grant of power in the offending branch. Further, international recourse likewise could be blocked simply by the United States government's refusal to submit to international jurisdiction.

281. *Id.* art. 2, at 280.

282. *Id.* preamble, at 278.

283. *Review of Further Developments in Fields With Which the Sub-Commission has been Concerned,* at 5, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) [hereinafter *Genocide Report*] (reporting to the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the question of the prevention and punishment of the crime of genocide).

284. *Roach Death Penalty Case, supra* note 20, at 169.

285. *See* Parker & Neylon, *supra* note 15, at 430-31 & n.118.

286. American Declaration, *supra* note 197, art. I, at 18.

287. *Id.* art. XIII, at 20.

288. *See* RESTATEMENT (THIRD), *supra* note 227, § 702, cl. (a).

289. *Draft Indigenous Rights Declaration, supra* note 244, at 3.

290. J. MARTINEZ COBO, *supra* note 230, at 15-16. A report on genocide presented to the United Nations Sub-Commission on the Prevention of Discrimination and Protection of

The government's treatment of the Tribes, with the explicit approval of the United States Supreme Court in *Lyng*, amounts to ethnocide. Stripped of their lands by the United States government and living in poverty, the Tribes have only their religion left to sustain their culture. By effectively depriving them of their ability to practice their religion, the Supreme Court has relegated their culture and their group lives to the history books. When the symbols of a religion no longer work for an individual, an inevitable sense of dissociation both from the social nexus and from the quest for life follows.[291] When a considerable number within a civilization find themselves in this predicament, that civilization passes a point of no return.[292] This is the situation the Tribes face after *Lyng*.

V. Implementing International Human Rights Standards in United States Courts

The United States cannot resist the imposition of the international standards discussed in this Note upon its actions with regard to the Tribes, or any Native American tribe under similar circumstances. In the past, the United States government has relied primarily on three doctrines of international law interpretation to avoid enforcement of international human rights law:[293] the Act of State Doctrine, requiring the courts of one nation to refrain from ruling on or providing relief for acts done by another nation in its own territory;[294] the Political Question Doctrine, requiring courts to refrain from deciding issues more properly addressed by the legislative or executive branches;[295] and the Self-Execution Doctrine, requiring that treaties "operate of [themselves], without the aid of any legislative provisions" to be justiciable.[296] Neither these nor any other judicial doctrines may be invoked,

Minorities supports the position that "the definition of genocide should be broadened to include cultural genocide or 'ethnocide,' and also 'ecocide.'" *Genocide Report, supra* note 283, at 17. "Ecocide" is "adverse alterations, often irreparable, to the environment . . . which threaten the existence of entire populations . . . ." *Id.* The report acknowledged that "[o]ther opinions have argued that cultural ethnocide and ecocide are crimes against humanity, rather than genocide." *Id.* Acceptance of this theory, however, does not affect the Tribes' claim before the Commission; as a crime against humanity, ethnocide is still *jus cogens*, and it is still a violation of the right to the benefit of a culture under the American Declaration. *See supra* note 287 and accompanying text.

291. J. CAMPBELL, THE MASKS OF GOD: CREATIVE MYTHOLOGY 5-6 (1968).

292. *Id.*

293. *See* Parker & Neylon, *supra* note 15, at 445-52.

294. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

295. Baker v. Carr, 369 U.S. 186, 217 (1962).

296. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829).

however, to defeat claims of *jus cogens* violations.[297] *Jus cogens* is a legal, not a political question, because peremptory norms are mandatory and do not allow courts to decline judicial review.[298] Further, *jus cogens* claims abrogate notions of state sovereignty:[299] "[a] claim arising out of an alleged violation of fundamental human rights . . . would . . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts."[300]

Given the profound nature of the human rights violations in *Lyng* as well as the United States' recognition and use of customary international law as binding on its domestic and international matters, the United States could not ignore a denunciation of the *Lyng* decision by an international juridical body such as the Commission.

Because the fundamental rights discussed in this Note are *jus cogens,*[301] and because the United States has agreed to adhere to them,[302] United States courts must find a way to incorporate them into their domestic adjudication. This is not a radical or even novel idea; United States courts already apply what amount to customary human rights standards.[303] The Supreme Court has stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination."[304] Federal courts often use international law in deciding domestic issues.[305] Unfortunately, not all courts have recognized this body of law

297. Parker & Neylon, *supra* note 15, at 445-56.

298. *Id.* at 447.

299. *See id.* at 446.

300. RESTATEMENT (THIRD), *supra* note 227, § 443 comment (c).

301. *See supra* notes 225-227, 264-266, 284-288 and accompanying text.

302. The United States Government is bound to observe the obligations set forth in the American Declaration. *Roach Death Penalty Case, supra* note 20, at paras. 46-49; *see also supra* notes 197-199 and accompanying text (a petition alleging United States violations of human rights must be framed in terms of the American Declaration). Because the Commission, in determining the scope of human rights defined in the American Declaration, may look to *jus cogens* standards for such definitions, it probably would find that the right to self-determination and the prohibition of *apartheid* and genocide are all rights protected under the American Declaration as *jus cogens. See supra* notes 225-227, 264-266, 284-288 and accompanying text.

303. Parker & Neylon, *supra* note 15, at 456-63.

304. The Paquete Habana, 175 U.S. 677, 700 (1900).

305. The most important modern example of this principle is set forth in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), in which the court granted jurisdiction for a tort claim against an alien under the Alien Tort Claims Act. The court recognized that "international law confers fundamental rights upon all people vis-a-vis their own governments." *Id.* at 885. The tort claim was based upon an allegation of torture, which the court recognized as a violation of international law. *Id.* at 884. In arriving at the conclusion that "a state's treatment

as binding or even influential in deciding domestic issues.[306] Further, many courts that appear willing to recognize international standards narrowly interpret these standards.[307]

One scholar has proposed that the solution to this problem is to use "international human rights principles [to] guide the determination of 'legal process' issues concerning judicial review of constitutional rights claims."[308] This "modest" approach is advanced because the "isolationist bent of the American legal system" frustrates wholesale incorporation of international human rights law into domestic jurisprudence.[309] Under this approach, "international norms would inform the process—the analytical or methodological questions—rather than the substance of domestic individual rights adjudication."[310] These norms should be used "only to expand, rather than to limit, protections of individual rights under domestic law,"[311] and would counteract the "narrow view of judicial power to protect individual rights"[312] that has gathered momentum in the Supreme Court since the 1970s.

This approach could have altered the outcome of the *Lyng* decision: an interpretation of the first amendment that considers the international human rights discussed in this Note likely would find that the building of the G-O Road violates the Tribes' rights. Further, this type of interpretation would protect the religious rights of other Native American tribes in a post-*Lyng* environment by limiting government land-use decisions that adversely affect religious rights. Finally, a broad acceptance of international norms as interpretive aids to domestic law

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of its own citizens is a matter of international concern," *id.* at 881, the *Filartiga* court cited several human rights instruments, including the United Nations Charter, the Universal Declaration of Human Rights, and several General Assembly resolutions. *Id.* at 881-83.

Filartiga is only the most prominent example of use by United States' courts of international law. *See* Burke, Coliver, de la Vega & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts,* 18 TEX. INT'L LAW J. 291 (1983). International law also has been invoked in cases of indefinite detention, Fernandez v. Wilkinson, 505 F. Supp. 787, 798-99 (D. Kan. 1980); treatment of prisoners, Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980); and in several different state decisions. Burke, Coliver, de la Vega & Rosenbaum, *supra,* at 315-25. *But see id.* at 320 (pointing out two district court opinions that refused to adopt the *Filartiga* approach of using international law to determine domestic matters).

306. *See supra* note 29.

307. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812-14 (D.C. Cir. 1984) (Bork, J. concurring) (suggesting there should be no cause of action under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1990), for violations not recognized as international crimes in 1789). This approach is dangerously out of touch with the needs of a rapidly changing world.

308. Strossen, *supra* note 28, at 805.

309. *Id.*

310. *Id.* at 805-06.

311. *Id.* at 806.

312. *Id.* at 807.

in general would establish a more uniform application of these norms.[313]

Ultimately, however, such an analytical or methodological approach must be only an intermediate step to direct incorporation of international human rights law into domestic law. To begin with, the analytical approach focuses only on the protection of *individual* rights. Many fundamental human rights (including the right to self-determination and the right to be free from genocide and *apartheid*), however, are collective in nature; the analytical approach would do little to protect these group rights, which are of particular importance to Native Americans. More importantly, although the analytical approach is more modest, and therefore more palatable, it is inadequate because the United States has agreed to and actually *is bound* to protect certain fundamental rights.

Recognition of international human rights may be slow in coming. The Supreme Court has refused to recognize international standards in determining fundamental rights, and the Inter-American Commission has no independent enforcement mechanism.[314] A declaratory condemnation of the *Lyng* decision by the Commission may amount to no more than that.

Recognition will come; however the world is becoming too small a place for any nation to maintain an isolated, parochial view of human rights. International attention on and condemnation of human rights violations is a necessary first step to eradicating these violations worldwide. Recognition may come through political pressure applied by other nations, legislation that is sensitive to violations, or greater attention by courts to violations. Regardless of the means, however, the United States cannot continue to demand compliance with international laws from other nations until it complies as well.

Conclusion

This Note has attempted to demonstrate that the *Lyng* decision violated the Yurok, Karok, and Tulowa tribes' right to freedom of religion under the Constitution and their human rights according to international law. Given the fundamental nature of the rights involved, the decision cannot be justified simply by dressing it in constitutional garments. Further, it seems clear that United States courts currently are not prepared to view claims from Native Americans any more fa-

313. *See supra* notes 18-19 and accompanying text.

314. *See, e.g.*, Norris, *supra* note 192, at 752-53 (stating that, in the typical case before the Commission, "the petitioner may expect an investigation, fact-finding, and resolution that may represent only a moral victory").

vorably than they have historically, despite the congressional mandate of AIRFA to do so. It is crucial, therefore, that complaints by Native American tribes are heard by the Inter-American Commission on Human Rights, so that they may obtain redress for their grievances. It is equally crucial that the Commission take the appropriate action to censure the United States government should it find that the Tribes' claims, or those of any Native American tribe, are valid. Only in this way can Native Americans' rights be suitably protected, given the current hostile domestic environment. Perhaps most importantly, only by censuring *all* nations for violating international human rights can an effective enforcement procedure for such rights be established.